not be qualified or varied from its natural import, but must speak for itself. The rule does not forbid the inquiry into the object of the parties in executing and receiving the instrument."

In the various state jurisdictions parol evidence of this nature was, in the earlier cases, received only in cases of fraud or mistake and the courts of a few states still hold this to be the only ground which justifies the admission of such evidence. In most jurisdictions, however, it is deemed sufficient evidence of fraud for the grantee to treat the conveyance as absolute, when it was not so intended, and the tendency of the later cases is to admit such evidence to show the nature of the transaction and the intention of the parties, even though there is no allegation of fraud or mistake. The intention of the parties always governs, and if the deed was intended as a security for a debt, it is always a mortgage. The Statute of Frauds was at first supposed to stand in the way of allowing such a deed to be proved a mortgage by parol evidence. The courts were finally forced, however, to establish such a doctrine, in order to prevent a statute, designed to prevent frauds, from itself becoming an instrument of fraud and injustice. It is no violation of the statute to introduce evidence of the real agreement as an element in the proof of fraud in the transaction and as relief is granted by setting aside the deed, such evidence is admitted to justify the court in impeaching the instrument, and not to substitute a different contract in its place. In some few states, the intention of the parties to create a security for a debt, is regarded only as raising a trust in favor of the grantor, which equity will enforce.

In California, parol evidence is admissible at law as well as in equity,[6] although the proof must be clear and convincing, before a deed, absolute on its face, will be declared a mortgage.[7] Evidence of the circumstances and relations existing between the parties is admitted, not for the purpose of contradiction or varying the written instrument, but to show a state of facts dehors the instruments, raising an equity superior to its terms.[8] The deed must speak for itself but the intention of the parties in executing the instrument may be looked into. Fraud in the use of the instrument is as much a ground for the interference of a court of equity, as fraud in its creation.

A. H. C.

Evidence: The Privilege of One Spouse not to Testify "for or against" the Other.—At common law neither spouse was a competent witness for or against the other. In modern law,[1] this incompetency has been removed, leaving two distinct privileges, which may be waived by such consent as the statute requires. They are (1) that no testimony be given by one spouse against the other as party, and, (2) that no testimony be given by either spouse in any

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[6] Jackson v. Lodge, (1868) 36 Cal. 28.
[7] Henley v. Hotaling, (1871) 41 Cal. 22.
[8] Pierce v. Robinson, (1859) 13 Cal. 116.

case as to communications made by one to the other during the marriage. The latter privilege is founded on sound public policy and is not questioned. The operation of the other privilege rule, however, shows it to be unnecessary. In fact, the tendency of courts and legislatures has been to avoid, so far as possible, the unjust consequences of its consistent application.

In Hunter v. State,[2] the Oklahoma court, in an elaborate opinion not necessary to the decision of the case, said that the wife might testify against her husband upon trial in a criminal prosecution for failure to provide their child with necessary food and clothing. This result was reached despite the fact that the only exception to the privilege in the Oklahoma statute was for " a crime committed" by one spouse against the other or for " an offense by one against the other". By a liberal construction the exception is extended to include adultery and bigamy as well as neglect and non-support of children The decision is in accord with the view adopted by the courts of Nebraska, Iowa and Utah.[3]

In jurisdictions, like California, where the rule has been more strictly construed by the courts,[4] the legislature has added numerous exceptions by frequent amendments. In 1872, the only exception of the Penal Code was that allowed by the common law to protect the spouse from criminal violence. The present form of sec. 1322, Penal Code, includes criminal violence, bigamy, adultery, omission to provide for children, non-support or abandonment of the wife, and crimes against the person or property of the other spouse New amendments are framed to meet the difficulties of new cases.

An anomalous situation is presented. On the one hand, the privilege rule is justified, even praised, as founded on sound public policy against family dissension. At the same time, the courts and legislatures are constantly going out of their way to escape the logical results to which the rule leads. The fact is, "that the peace of families does not essentially depend on this immunity from compulsory testimony. . . . . Of the multifold circumstances of life that contribute to cause marital dissension, the liability to give unfavorable testimony appears as only a casual and minor one, not to be exaggerated into the foundation for an important rule." As pointed out by Professor Wigmore,[5] the basis of the rule is sentiment, and not justice or sound public policy. Instead of complicating the law by resorting to elastic construction or to biennial amendments, the simpler and better solution would be to do away entirely with the rule itself.

The need of statutory revision in California in this regard is the more imperative because of the confusion and inconsistency of the

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[2] (Sept. 17, 1913) 134 Pac. 1134 (Okl)

[3] 5 Mich. Law Review 587.

[4] People v. Warner, (1897) 117 Cal. 637, 49 Pac. 841; Humphrey v. Pope, (1905) 1 Cal. App. 374, 82 Pac. 223; 19 Harv. Law Review 545.

[5] Wigmore on Evidence, secs. 2227, 2228, 2239, 2241.

codes. By what is probably an oversight, the Civil Procedure Code, sec. 1881, preserves the antiquated phraseology of the common law rule of incompetency in retaining "for or against," and so confuses disqualification and privilege. The matter of consent is complicated by requiring the consent of both in the Penal Code, sec. 1322, and the consent of "the other" than the witness-spouse in the Civil Procedure Code, sec. 1881. The reason often given for the privilege is "the great and natural repugnancy felt to compelling the spouse to testify." So, logically, the privilege should not be denied the witness-spouse; nevertheless, such is the literal meaning of the language used in the Code of Civil Procedure rule, sec. 1881.[6] Taken together the legislative enactments amount to this. By the Code of Civil Procedure rule, one spouse cannot testify for the other without the other's consent; and by the Penal Code one spouse cannot testify for the other without the other's consent plus the consent of the witness-spouse himself. Can the "peace of the family" be overturned by one spouse testifying for the other? This is the basis of the Civil Procedure rule. Or can there be "great natural repugnance" felt to having one spouse testify for the other? All reasons of public policy, real or imaginary, as well as the reasons of common sense fail to justify such rules.

C. S. J.

Federal Practice: Conformity with State Practice in Actions at Law.—Since the adoption of the new equity rules by the Supreme Court of the United States, the form books to which lawyers rushed for aid in a Federal equity suit have been thrown into the waste basket and Daniell's Chancery Pleading and Practice is seldom taken from the shelf. It was a strange and alien system to a practitioner in a jurisdiction where law and equity are fairly well fused and there is but one form of action.

In actions at law since 1872 the Federal Courts have been required to conform "as near as may be" to the practice, pleadings and forms and modes of proceeding in the State Courts.[1] It is now proposed that the Supreme Court adopt a simple and uniform Federal procedure at law framed on the principles of the equity rules. The argument against the change is that every lawyer will have to familiarize himself with a new and different practice act; but is this objection good in view of the fact that state practice is followed only where Congress and the Federal Courts think it should be?

In a suit at law in the Federal Courts, the deposition of a party can not be taken; the grounds and procedure for depositions de bene esse are different; the same is true of proceedings for the production of documents; equitable defenses can not be set up in an action at law but a separate proceeding in equity must be instituted, although

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[6] Wigmore on Evidence, sec. 2241.

[1] U. S. Rev. Stat. sec. 914; U. S. Comp. Stat. 1901, p. 684; Fed. Stat. Ann. vol. 4, p. 563.